Office - Supreme
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant,

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN AND THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

MICHAEL L. PERLIN*
Special Counsel to the
Public Advocate
RICHARD E. SHAPIRO
Director, Division of
Public Interest Advocacy
SUZAN R. SHAPIRO
Law Intern

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

R. WILLIAM POTTER
Assistant Public Advocate

Department of the
Public Advocate
Richard J. Hughes
Justice Complex
CN 850
Trenton, NJ 08625
(609) 292-7087

*Counsel of Record

The Copy Center, Inc. 615 Chestnut Street Philadelphia, PA 19106 (215) 928-1900

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

STATEMENT OF INTEREST OF AMICUS CURIAE..... 2

STATEMENT OF THE CASE..... 6

SUMMARY OF ARGUMENT..... 12

ARGUMENT

I. THE PRIVILEGES AND IMMUNITIES CLAUSE WAS ADOPTED TO INSURE NATIONAL UNIFICATION WHILE STILL PRESERVING THE UNIQUE ATTRIBUTES OF STATE SOVEREIGNTY IN THE FEDERAL SYSTEM..... 15

A. Introduction..... 15

B. The Standard Historical Basis for Inclusion of the Clause..... 21

C. Contemporaneous Reasons For Inclusion of Clause..... 29

D. The Complete Historical Record Reveals That the Clause Was the Product of a Delicate Accommodation of the Proponents of the State Sovereignty and National Unity..... 39

II. THE PRIVILEGES AND IMMUNITIES CLAUSE IS NOT A BAR TO A CITY ORDINANCE THAT ACCORDS A LIMITED PREFERENCE TO ITS OWN RESIDENTS IN PUBLICLY FUNDED, PUBLIC WORKS PROJECTS FOR OR ON BEHALF OF THE CITY..... 45

PAGE

A. The Privileges and Immunities Clause Does Not Apply To A Local Ordinance That Favors City Residents Over-In-State and Out-Of-State Non-Residents..... 46

B. The Reduced Opportunity To Work On A Publicly Funded, Public Works Crew Is Not A Privilege Or Immunity Protected By Article IV, Sec. 2..... 51

C. This Court's Interpretation of The Commerce Clause Provides Persuasive Support For Upholding The Validity of the Camden Ordinance..... 60

CONCLUSION..... 64

TABLE OF AUTHORITIES

CASES — PAGE

Austin v. New Hampshire, 420 U.S. 656 (1975)..... 20,21,22,23, 24,38,49

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978)..... 19,21,24,52, 57,60,61

Blake v. McClung, 172 U.S. 239 (1898)..... 47

Campbell v. Morris, 3 Harr. & McHen. 535 (Md. Gen'l Ct. 1797).... 26

Chandler v. Florida, 449 U.S. 560 (1981)..... 51

City of Camden v. Skokowski, 88 N.J. 304, 441 A.2d 741 (1982)..... 6

Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230)(C.C.E.D. Pa. 1823) 24,27,28

Crane v. New York, 239 U.S. 195 (1915)..... 58

Dean Milk Co. v. City of Madison 340 U.S. 349 (1951)..... 49

Doe v. Bolton, 410 U.S. 179 (1973)..... 57

Douglas v. Stevens, 1 Del. Ch. 465, 477 (Del. Ct. E&A 1821)..... 27

PAGE

Hague v. CIO, 307 U.S. 496 (1938)..... 24

Heim v. McCall, 239 U.S. 175 (1915)..... 58

Hicklin v. Orbeck, 437 U.S. 518 (1978)..... 24,49,56,58,59,60,61,62

Hughes v. Alexandria Scrap Co., 426 U.S. 794 (1976)..... 61

Immigration and Naturalization Service v. Chadha, -- U.S. --, 51 U.S.L.W. 4907 (June 21, 1983)..... 17

Livingston v. Van Ingen, 9 Johns Cas. 507 (N.Y. Ct. Err. 1812). 27

Marsh v. Chambers, -- U.S. --, 51 U.S.L.W. 5162 (June 28, 1983)..... 17,21,45

Missouri v. Holland, 252 U.S. 416 (1920)..... 18

Mullaney v. Anderson, 342 U.S. 415 (1952)..... 56

Murray v. McCarty, 2 Munf. 373 (Va. Sup. Ct. App. 1811)... 27

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)..... 50

Paul v. Virginia, 75 U.S. 357 (1869)..... 24,28,46,47,52

PAGE

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)..... 57

Reeves, Inc. v. Stake, 447 U.S. 429 (1980)..... 44,51, 61,62

Solem v. Helm, -- U.S. --, 51 U.S.L.W. 5019 (June 28, 1983)..... 17

Toomer v. Witsell, 334 U.S. 385 (1948)..... 46,47,56, 58,60,64

United Bldg. & Constr. Trades Council v. Camden, 88 N.J. 317, 443 A.2d 148 (1982)..... 6,8,10, 11,48, 51

United States v. Ptasynski, -- U.S. --, 51 U.S.L.W. 4674 (June 7, 1983)..... 17

White v. Mass. Council of Constr. Employers, -- U.S. -- , 103 S. Ct. 1042 (1983)..... 11,54,59, 61,62

Zobel v. Williams, -- U.S. -- 102 S.Ct. 2309 (1982)..... 20,21, 22,24

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Art. I, §§, 7..... 17

U.S. Constitution, Art. I, § 7, cl. 2,3..... 17

PAGE

U.S. Constitution, Art. I, § 8, cl. 1..... 17

U.S. Constitution, Art. IV..... passim

STATUTES

(N.J.) Session Laws 11-2 (1787).... 37

STATISTICAL REFERENCES

Office of Administration and Finance for the City of Camden, "Average Annual Unemployment Rate," Tax Anticipation Note Prospectus (1983)..... 7,8,9

Planning Study, Division of Economic Development for the City of Camden (1980)..... 7

United States Bureau of the Census, Provisional Estimates of Social, Economic and Housing Characteristics--States and Selected Standards of Metropolitan Statistical Areas (1980)..... 9

OTHER AUTHORITIES

2 Adams, ed., The Works of John Adams (1850)..... 40

Antieau, Modern Constitutional Law (1969)..... 23

Antieau, "Paul's Perverted Privileges or the True Meaning of the Priv-

PAGE

ileges and Immunities Clause of Article Four," 8 Wm. & Mary L. Rev. 1 (1967)..... 19,23,24, 26,28,29

Berger, Government by Judiciary (1977)..... 19

Boyd, The Politics of Opposition: Antifederalists and the Acceptance of the Constitution (1979)..... 42

Brest, "The Misconceived Quest for the Original Understanding," 60 B. U. L. Rev. 204 (1980)..... 18,43

Burnett, The Continental Congress (1941)..... 41

1 Burnett, ed., Letters of Members of the Continental Congress (1921)..... 31,32

Cong. Globe, 35th Cong., 2d Sess. 984 (1862)..... 28

Cong. Globe, 39th Cong., 1st Sess. 474-475 (1866)..... 28

Currie, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," in Currie, ed., Selected Essays on the Conflicts of Laws (1963)..... 19,44

PAGE

Davis, Sectionalism in American Politics, 1774-1787 (1977)..... 34,35,37, 38,41

5 Elliot's Debates 487 (2d ed. 1836)..... 26

Ely, Democracy and Distrust: A Theory of Judicial Review (1980)..... 47,49

6 Fairman, Reconstruction and Reunion 1864-88, Part One (1971)..... 30

1 Farrand, Records of the Federal Convention of 1787 (1911)..... 19,20

3 Farrand, Records of the Federal Convention of 1787 (1911)..... 20,22

Ferguson, "The Nationalists of 1781-1783 and the Economic Interpretation of the Constitution," in Wood, ed., The Confederation and the Constitution: The Critical Issues (1973)..... 42

Hamilton, The Federalist No. 80 (Bourne ed. 1942)..... 25,32

PAGE

Howell, The Principles and Immunities of State Citizenship (1918)..... 25

Hutson, "Country, Court and Constitution: Antifederalists and the Historians," 38 Wm. & Mary Q. 337 (1981)..... 16,30

Jay, "An Address to the People of the State of New York on the Subject of the Constitution," (1787), in Ford, ed., Pamphlets on the Constitution of the United States (1888)..... 17

Jensen, The Articles of Confederation (1948)..... 16,31,32, 38,40

Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (1950)..... 16,34, 35,37

2 Kent, Commentaries (12th ed. 1873) 33

Kenyon, ed., The Antifederalists (1966)..... 30,40

Leedes, "A Critique of Illegitimate Noninterpretivism," 8 U. Dayton L. Rev. 533 (1983)..... 19

PAGE

McCormick, Experiment in Independence: New Jersey in the Critical Period, 1781-1789 (1950) 35,36

Main, The Antifederalists: Critics of the Constitution, 1781-1788 (1961)..... 30,40

Miller, Change and Fundamental Law: America's Evolving Constitution (1979)..... 18

Miller, "Toward a Definition of 'The' Constitution," 8 U. Dayton L. Rev. 633 (1983)..... 19,33

Monaghan, "Our Perfect Constitution," 56 N.Y.U.L. Rev. 353 (1981)..... 18

Murphy, The Triumph of Nationalism: State Sovereignty, the Founding Fathers, and the Making of the Constitution (1967)..... 36

New Jersey Gazette, November 22, 1784 36

Randolph, "Letter on the Federal Constitution," in Ford, ed., Pamphlets on the Constitution of the United States (1888)..... 34

Rawle, A View of the Constitution of the United States of America (1825)..... 33

Riley, "Martin Diamond's View of The Federalist," Publius: J. Federalism, Vol. 8, No. 3 (Summer 1978), at 71 32

PAGE

Roche, "What Was the Relation of the Constitution to Democracy? The Founding Fathers: A Reform Caucus in Action," in Wood, ed., The Confederation and the Constitution: The Critical Issues (1973) 43

Rogers, "Municipal Corporations" in Yale Law School Faculty, eds., Two Centuries Growth of American Law, 1701-1901 (1902).. 30

Sandalow, "Constitutional Interpretation," 79 Mich. L. Rev. 1033 (1981)..... 18

Saphire, "Judicial Review in the Name of the Constitution," 8 U. Dayton L. Rev. 745 (1983)..... 19,42

Schlesinger, The Colonial Merchants and the American Revolution, 1763-1776 (1918)..... 31,34,35

Smith, "An Address to the People of the State of New York," in Ford, ed., Pamphlets on the Constitution of the United States (1888) 18,34

Smith, The Convention and the Constitution: The Political Ideas of the Founding Fathers (1965).. 22,42

1 Story, Commentaries on the Constitution of the United States §957 (Cooley ed. 1873).....17

Symposium, "Judicial Review and the Constitution--The Text and

PAGE

Beyond," 9 U. Dayton L. Rev. 443-831 (1983)..... 18

Thomas, "The Virginia Convention of 1788: A Criticism of Beard's An Economic Interpretation of the Constitution," 19 J. Southern Hist. 63 (1953)..... 30

Tribe, American Constitution Law (Supp. 1979)..... 23,25,61

Varat, "State 'Citizenship' and Inter-State Equality," 48 U. Chi. L. Rev. 487 (1981)..... 31,38,44

Wait, "Letter to George Thatcher," 16 Hist. Mag. 258 (1869)..... 40

Webster, A Dissertation on the Political Union and Constitution of the Thirteen United States (1783)..... 39

Webster, "The Weakness of Brutus Exposed," in Ford, ed., Pamphlets on the Constitution of the United States (1888)..... 33

Winthrop, "The Letters of 'Agrippa'", in Kenyon, ed., The Antifederalists (1966)..... 32,39

Wofford, "The Blinding Light: The Uses of History in Constitutional

PAGE

Interpretation", 31 U. Chi. L. Rev. 502 (1964)..... 18,19 20,21

Wolfe, "On Understanding the Constitutional Convention of 1787," 39 J. Politics 97 (1977)..... 30

Wood, ed., The Confederation and the Constitution: The Critical Issues (1973)..... 30,40 42,43

Wyzanski, "History and Law," 26 U. Chi. L. Rev. 237 (1959)..... 18

Zagorin, The Court and the Country: The Beginning of the English Revolution (1969)..... 30

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate (Department), an independent and unique executive agency of New Jersey state government, N.J.S.A. 52:27E-2,[1] has, for over nine years, litigated extensively in major areas affecting "the public interest." During this period, the Department has participated in a wide variety of proceedings involving issues relating to urban affairs, housing, employment, the environment, rights of the mentally handi-

---

[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings...as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this state inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30. See also, N.J.S.A. 52:27E-31 (factors to be considered in deciding whether to represent a particular public interest).

capped and utility regulation.[2] In these proceedings, the important role of the Department as a representative of the public interest has

---

[2] The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy. N.J.S.A. 52:27E-28 to 32. See, e.g., Southern Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. den. 423 U.S. 808 (1975), suppl. 92 N.J. 158, 456 A.2d 390 (1983) (fair share housing). This Division also participates in a wide range of activities involving concerns of the urban poor and minorities including advocacy for minority access to employment opportunities, pressing for the rights of the homeless and tenants in public housing, and ensuring adequate access to health care facilities and entitlement programs. Through this Division, the Department recently submitted an amicus brief in Silkwood v. Kerr-McGee, -- U.S. --, 103 S.Ct. 2080 (1983) (motion for leave to file granted) (case pending).

The Division of Mental Health Advocacy, which represents "indigent mental hospital admittees" in individual matters involving their "admission to, retention in, or release from" mental hospitals, N.J.S.A. 52:27E-24, and in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25, has filed amicus briefs in three other cases before this court involving mental health issues within its relevant experience and expertise. Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 422 U.S. 584 (1974); Jones v. United States, -- U.S. --, 51 U.S.L.W. 5041 (June 28, 1983).

been frequently acknowledged.[3]

This case presents the question of whether the Privileges and Immunities (P&I) Clause in Article IV of the Constitution is violated by a municipal ordinance which establishes a resident hiring quota for public works construction contracts. The Department is concerned about the impact of this question on Camden citizens, and on residents of other inner cities, both in New Jersey and elsewhere. Its resolution by this Court will bear on the ability of such cities to develop local solutions for the alleviation of the social and economic hardships imposed on their residents by the severe unemployment problems endemic to the nation's

---

[3] Recently, for example, the New Jersey Supreme Court characterized the Department as "a shining example of that commitment [by the government to the public interest,]" Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980), and of "admirably further[ing] the principles embodied in our Constitution," id. at 536, 416 A.2d at 893.

cities.

The Department appears as amicus curiae to both address the historic origins of the P&I Clause, stressing the social, economic and political forces which led to the Clause's adoption, and to examine those socioeconomic circumstances which compelled enactment of the ordinance in the light of this Court's prior decisions.

All parties have consented to the filing of this amicus curiae brief and consent letters are being filed simultaneously with the Court.

STATEMENT OF THE CASE

Camden, New Jersey is a city ravaged by the contemporary effects of urban social and economic decay. The tragic and "severe economic plight that has befallen the City of Camden," United Building and Construction Trades Council v. Camden, 88 N.J. 317, 340, 443 A. 2d 148, 159 (1982), was described in compelling terms by the Supreme Court of New Jersey less than one month before the decision in the case at bar:

> Camden is one of the older urban areas in the State and is afflicted with the ills typical of these centers. Its unemployment rate generally averages two or three times the national rate; approximately 20% of the population consists of senior citizens; it has one of the highest uncollectible tax rates in the State; more than 13% of the houses are owned by the City; the residental tax base is small and consists of very modest homes; and industrial and commerical values have steadily shrunk over the last three decades.

City of Camden v. Skokowski, 88 N.J. 304, 305, 441 A. 2d 741, 742 (1982).

While statistics can never fully convey the harsh reality of Camden's problems, they do bear striking witness to the extent of the City's social and economic deterioration. For example, there has been a severe decline in employment opportunities in Camden during the past thirty years.[3A] Corresponding with the decline in available jobs has been a sharp rise in unemployment during the past several years, so that the rate of unemployment in Camden in 1982 was twice as high as that in New Jersey or the United States.[3B] The city's high unemployment rate has had a

---

3A Planning Study, Division of Economic Development for the City of Camden (1980). This study is available through the Office of Development of the City of Camden.

3B Figures obtained from the New Jersey Department of Labor and Industry and the United States Bureau of Labor Statistics, and compiled by the City of Camden, illustrate the annual unemployment rates from 1976-82 for Camden, the State of New Jersey and the United States:
(Footnote continued on next page)

particularly acute impact on minority residents of Camden, who constitute over 70% of the City's population.[3C] As a consequence, as recently as 1977, the unemployment rate among Blacks and Hispanics was 18.4% and 15.6% respectively (Appendix 36).

Camden's severe unemployment has

(Footnote 3B continued)

	Camden	State of N.J.	U.S.
1976	14.8%	10.4%	7.7%
1977	13.3	9.4	7.0
1978	9.6	7.2	6.0
1979	9.9	6.9	5.8
1980	10.4	7.2	7.1
1981	16.7	7.3	7.6
1982	19.7	9.0	9.7

"Average Annual Unemployment Rate", Tax Anticipation Note Prospectus, Office of Administration and Finance for the City of Camden (1983), at 6 [hereinafter referred to as OAF Prospectus]. This prospectus is also available through the Office of Development of the City of Camden.

[3C] The 1980 Official United States Census Bureau statistics reveal that Blacks represent 53% of the population and that 19.2% of Camden residents identify themselves as being of Hispanic origin. United Building and Constr. Trades Council, 88 N.J., supra, at 327, 443 A.2d at 153.

exacerbated its other problems. For example, in 1980, approximately 29% of Camden households received some form of public assistance compared to only 7.5% households in the State of New Jersey and 8% for the Nation.[3D] The average per capita income in Camden for more than a decade has been below state and national levels; in 1979, the per capita income for the City was approximately 44% less than that of Camden County, 54% less than that of New Jersey, and 38% less than that of the country.[3E]

Against this background of an imminent urban apocalypse and a "well-documented history

---

3D The figures for Camden and the State of New Jersey are drawn from the 1980 Official United States Census Bureau statistics and the national figures are derived from the United States Bureau of the Census, Provisional Estimates of Social, Economic, and Housing Characteristisc--States and Selected Standards of Metropolitan Statistical Areas (1980).

3E See OAF Prospectus, supra, note 3C at p. 8.

of minority under-representation in the construction trades" in the State, United Building and Constr. Trades Council, 88 N.J., supra, at 334, 443 A.2d at 156, the Camden City Council, on July 24, 1980, adopted "An Ordinance to Establish an Affirmative Action Program in Connection with Construction Contracts to Be Performed For or On Behalf of the City of Camden." (A36-53). On August 28, 1980, the Council amended the ordinance requiring 40% of all public works contract employees to be city residents (A. 56).[3F]

On February 18, 1982, the Supreme Court of New Jersey upheld this provision and other portions of the Ordinance against a range of constitutional attacks (A. 1-32). With regard

---

3F Because minorities comprise a much higher percentage of Camden's population than non-minorities, a requirement that the City's construction contracts have 40% residents will not only increase minority job opportunities but also will stimulate the economic revitalization of the City by enhancing the employment opportunities for all residents.

to the appellant's challenge under the P&I Clause, the Court stated:

> This Court declines to apply the Privileges and Immunities Clause in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality.

Id. at 341-42, 443 A.2d at 160.

On March 7, 1983, this Court noted probable jurisdiction to review this judgment.[3G]

3G The Commerce Clause issue has been foreclosed by this Court's decision on February 28, 1983, in White v. Mass. Council of Constr. Employers, -- U.S. --, 103 S.Ct. 1042 (1983).

SUMMARY OF ARGUMENT

Seeking to revitalize its stagnant economy and generate jobs for its severely unemployed population, the City of Camden enacted an ordinance in 1980, reserving 40% of all jobs in publicly-funded construction projects "for or on behalf of" the city to its residents. Nonresidents are fully eligible for the remaining 60%. The ordinance was an innovative local response to the crushing and complex problems of urban decay -- a true experiment in economic revitalization.

Nothing in the history of the P&I Clause or precedent bars a city from taking such creative steps to address local social or economic ills. While the Court's application of the Clause has respected the twin principles of national unity and federalism, a full inquiry into the clause's background demonstrates that the Framers of the Constitution clearly intended to strike a delicate balance in the Clause between national cohesive-

ness and preservation of the sovereignty and cultural diversity of the several states. This accommodation was reflected in the Framers' intent to include the Clause as a barrier to major threats to national unity, comparable to the military and trade disputes that plagued the nation throughout the late Eighteenth Century. (Point I).

When viewed in light of this historical framework, the Clause's inapplicability to the ordinance is obvious. Because it does not favor New Jersey residents over residents of other states, but instead merely provides a limited preference for Camden residents over all non-Camden residents, the Clause's historic concerns are not implicated.

Furthermore, the reduced opportunity of nonresidents to work on publicly funded, public works crews in Camden is simply not the type of privilege or immunity contemplated by the Clause. Indeed, the record is silent on the

effects of the ordinance on non-New Jersey residents; the vague and ill-defined impact hypothesized by appellant is radically different from the broad restrictions and disparate treatment invalidated under the Clause. Finally, the principles underlying the Commerce Clause, provide compelling support for upholding the ordinance. When a city acts in its proprietary role, it should be able to accord limited preferential treatment to its residents without being interdicted by the provisions of the P&I Clause. (Point II).

Any other result would convert the wise accommodation of the Framers, and this Court's prior decisions, into a rigid, mechanical ban. Such a cribbed interpretation of the Clause would stifle creative efforts of local governments to address the complex economic problems of unemployment and decay, blighting the urban landscape of our country.

ARGUMENT

I. THE PRIVILEGES AND IMMUNITIES CLAUSE WAS ADOPTED TO INSURE NATIONAL UNIFICATION WHILE STILL PRESERVING THE UNIQUE ATTRIBUTES OF STATE SOVEREIGNTY IN THE FEDERAL SYSTEM

A. Introduction

Appellant argues strenuously that the Privileges and Immunities Clause -- "designed as an instrument of national unification," Brief of Appellant at 16 -- applies to this case. It casts the issue as one involving a "core concern," id. at 20, which "warrants careful scrutiny under the Privileges and Immunities Clause." Id. at 25.

Appellant errs in assuming that any distinctions between the employment of residents and non-residents in publicly funded, public works projects are, ipso facto, invalid under the Clause. The full development of the relevant history shows that the Clause was drafted and included in the Constitution in response to the specific economic, social and political problems facing the colonies (and subsequently the states)

during the latter part of the Eighteenth Century. Its inclusion was designed to avoid those internecine trade, military and diplomatic disputes and wars which, potentially, could have thwarted the Framer's goals of forging one unified nation. The drafters and others integrally involved in the political process at the time knew that delegates to the Continental Congress, for instance, saw themselves as "ambassadors of twelve distinct nations," Jensen, The Articles of Confederation 56 (1948) (hereinafter Jensen I).

The Clause was meant to unify the colonies, so as to avoid the "warring duchys" problems which had traditionally plagued European empires.[4] See, e.g., Jay, "An Address to the People of the State of New York on the Subject of the

---

[4] See, e.g., Jensen I, supra, at 4,6; Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 vii-viii, 422 (hereinafter Jensen II); see generally, Hutson, "Country, Court and Constitution: Antifederalists and the Historians," 38 Wm. & Mary Q. 337 (1981).

Constitution," (1787), in Ford, ed., Pamphlets on the Constitution of the United States 67, 84 (1888). It is evident, however, that the clause was historically not designed to preclude a state or municipality from taking residency into account in creatively addressing local social or economic problems.[5]

---

[5] The Court has long recognized the importance of the full development of the historical background of the Constitution as a guide to its contemporary application. Indeed, on at least four occasions during the 1982 Term, the Court premised decisions largely on an historical analysis of the "concerns giving rise" to the inclusion of specific clauses in the Constitution. See, e.g., United States v. Ptasynski, -- U.S. --, 51 U.S.L.W. 4674, 4676 (June 7, 1983) (construing Uniformity Clause, Art. I, sec. 8, cl.1, and relying on 1 Story, Commentaries on the Constitution of the United States Sec. 957 (Cooley ed. 1873); Immigration and Naturalization Service v. Chadha, -- U.S. --, 51 U.S.L.W. 4907, 4915-4916 (June 21, 1983) (construing, inter alia, the Presentment Clauses, Art. I, Sec. 7, cl. 2,3, and the Bicameralism requirements, Art. I., Secs. 1, 7); Solem v. Helm, -- U.S. --, 51 U.S.L.W. 5019, 5021 (June 28, 1983) (Eighth Amendment's proportionality requirement rooted in the Magna Carta); Marsh v. Chambers, -- U.S. --, 51 U.S.L.W. 5162, 5163 (June 28, 1983)(tradition of opening legislative sessions with prayer "deeply embodied in the history and tradition of this country").

Full development of the historical patterns underlying the P&I Clause will demonstrate that this Court's application of the Clause has respected the twin purposes of national unity and federalism, even though its pertinent history has not been fully explored. While any attempt to delve more deeply into the thought processes and motivations of the Framers is fraught with peril,[6] such an effort to cast new light on the

---

[6] See, e.g., Smith, The Convention and the Constitution: The Political Ideas of the Founding Fathers 22-23 (1965) (hereinafter Smith I); Brest, "The Misconceived Quest for the Original Understanding," 60 B.U.L. Rev. 204 (1980); Wofford, "The Blinding Light: The Uses of History in Constitutional Interpretation," 31 U. Chi. L. Rev. 502, 530-533 (1964) (quoting, inter alia, Mr. Justice Holmes' opinion in Missouri v. Holland, 252 U.S. 416, 433-434 (1920)); Wyzanski, "History and Law," 26 U. Chi. L. Rev. 237 (1959); Monaghan, "Our Perfect Constitution," 56 N.Y.U.L. Rev. 353 (1981); Miller, Social Change and Fundamental Law: America's Evolving Constitution, ch. 10 (1979); Sandalow, "Constitutional Interpretation," 79 Mich. L. Rev. 1033, 1039 (1981).

Of special interest is the recent Symposium, "Judicial Review and the Constitution -- the Text and Beyond," 8 U. Dayton L. Rev. 443-831 (1983).
(Footnote continued on next page)

Clause[7] is essential if we are to move beyond the few sources[8] repeatedly referred to in

---

(Footnote 6 continued)
Within that volume, see especially, Leedes, "A Critique of Illegitimate Noninterpretivism," 8 U. Dayton L. Rev. 533 (1983); Miller, "Toward a Definition of 'The' Constitution," 8 U. Dayton L. Rev. 633 (1983); Saphire, "Judicial Review in the Name of the Constitution," 8 U. Dayton L. Rev. 745 (1983).

7 "Little analysis has been devoted to the role of the privileges and immunities clause in the original scheme of things." Berger, Government by Judiciary 5-6 (1977). See also, Currie, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," in Currie, ed., Selected Essays on the Conflicts of Laws 460 (clause "not among the more definitively glossed provisions of the Constitution"); Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 8 Wm. & Mary L. Rev. 1 (1967) (hereinafter Antieau)(clause "misinterpreted" and "misunderstood"). See Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 379 (1978).

8 As Wofford has noted, sole reliance on Farrand's compilation and/or on Madison's Debates "leaves a great deal to be desired," 31 U. Chi. L. Rev., supra, at 504; Wofford points out that Farrand conceded that "the Journal cannot be relied upon absolutely," id. at 505, quoting 1 Farrand, Records of the Federal Convention of 1787 xiii (1911); "What we do not have, and indeed will never have, is an external check upon either the accuracy or the
(Footnote continued on next page)

majority[9] and concurring[10] opinions, and by appellant here.[11] As has been suggested:

> History thus provides enlightment. Indeed, the Court frequently says that it reads the provisions of the Constitution "in the light" of history. The image of light suggests most clearly how history should be used. It is neither prologue on the one hand, nor director of the drama on the other; rather,

(Footnote 8 continued)
completeness of [the] picture [of the Philadelphia proceedings]," Wofford, 31 U. Chi. L. Rev., supra, at 505-506.

Of special relevance to this case, Farrand specified that Pinckney's plan of government (presented to the Constitutional Convention on May 29, 1787) "is not among the papers of the Convention, nor has any copy of it ever been found," 1 Farrand, supra, at xxii (noting that "an outline of the plan and extracts from same...[made] it possible to present a fairly complete restoration of the original text," id. [emphasis added]). The May 29 plan, of course, is "framed exactly" on the parallel clause in the Articles. See 3 Farrand, supra, at 112; see Point IB, infra.

9 See, e.g., Austin v. New Hampshire, 420 U.S. 656, 661 (1975), referring to 3 Farrand, supra, at 112.

10 See, e.g., Zobel v. Williams, -- U.S. -- , 102 S. Ct 2309, 2322 (1982) (O'Connor, J., concurring), referring to 3 Farrand, supra, at 112.

11 See, e.g., Brief of Appellant at 18, n. 32

> history is a spotlight, always available to illuminate, but not to blind. History does not provide the answers to the problems of today; it merely helps to frame the questions.

Wofford, 31 U. Chi. L. Rev., supra, at 532-533 (footnote omitted).12

B. The Standard Historical Reasons for Inclusion of the Clause

In analyzing the P&I Clause, the Court has traditionally looked to the Clause's history to gain insight into its original meaning.[13] Thus, the Court has concluded that the Clause's purpose is to protect a set of core interests deemed necessary for national unity. A fuller inquiry into the dynamics of eighteenth century American society, see Section IC, infra, sheds further light on the Framers' intent. Specifically, a pattern of conflict between the states --

---

12 Wofford was most recently cited with approval in Marsh, 51 U.S.L.W., supra, at 5165, 5171, n. 33 (Brennan, J., dissenting).

13 See, e.g., Austin, supra; Baldwin, supra; and Zobel, supra.

coupled with a desire to maintain the nation's cultural diversification -- provides the historical backdrop for the explicit guarantees in the P&I Clause.

It is not enough to say that the Clause is only an abbreviated version of its predecessor in the Articles of Confederation. See Austin, 420 U.S., supra, at 662; Zobel, 102 S. Ct., supra, at 2322-23 (O'Connor, J., concurring). In supporting this theory, the Court has consistently relied on a statement by Charles Pinckney, delegate from South Carolina and author of the Clause, that the Clause "is formed exactly upon the principles of the fourth Article of the present Confederation..." 3 Farrand, supra, at 112, as cited in Austin, 420 U.S., supra, at 662, n. 6; Zobel, 102 S. Ct., supra, at 2323 (O'Connor, J., concurring).[14]

---

[14] There may be some question as to the accuracy of Pinckney's quotation. See footnote 8, supra.

The Confederation provision -- referred to by Pinckney -- included two guarantees: the first, assuring to free inhabitants "all privileges and immunities of free citizens in the several states," guaranteed basic rights common to all citizens; the second guaranteed commercial interstate equality to protect non-residents in states other than their own. See Antieau, supra; Antieau, Modern Constitutional Law 661-715 (1969). Greater weight has been given to this second guarantee by the Court as evidenced by the fact that the P&I clause has come to be read as creating "a norm of comity" defined by the extent of those rights afforded by a state to its own citizens. See Austin, 420 U.S., supra, at 1192.[15]

---

[15] But see Antieau, supra, at p. 6 (arguing that the deletion at the Convention of the Articles of Confederation language concerning trade or commerce indicated that the Clause was not intended to be commercial in scope); Tribe, American Constitutional Law 36-37 and n. 80

(Footnote continued on next page)

In addition to relying on Pinckney, the Court has supported its interpretation with a line of decisions beginning in 1869 with Paul v. Virginia, 75 U.S. 357 (1869). E.g., Zobel, 102 S. Ct., supra, at 2320, n. 7; Austin, 420 U.S., supra, at 378; Hicklin v. Orbeck, 437 U.S. 518, 522 (1978).[16] However, the Court, in its search for the historical origins of the Clause, has not examined adequately the pre-

---

(Footnote 15 continued)
(Supp. 1979) (criticizing a commercial emphasis as "narrowly historicist" and not "consistent even with the breadth of the catalogue of fundamental rights" in Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823)).

[16] In Paul, Justice Field defined the privileges and immunities granted to non-state residents as those "which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." 75 U.S., supra, at 180-181.

Although the Court has generally relied on the Paul analysis, it seems to recognize that Paul represented a rejection of an earlier fundamental rights approach. See Baldwin, 436 U.S., supra, at 382, citing Hague v. CIO, 306 U.S. 624 (1938).

Paul case law and legislative histories to discern the Framers' intent. This information reveals that the underlying historical record is not as limited as has been implied.[17]

A complete review reveals that the fundamental rights guarantee -- rather than the interstate commercial guarantee of Article IV of the Articles -- was intended to be the principle governing the Clause; this purpose is even implied by Hamilton. In No. Eighty of the Federalist Papers (Bourne ed. 1942), he suggests

---

[17] During this period, the dominant political philosophy was natural rights. Antieau, supra, at 4-5. According to this doctrine, government was organized to safeguard certain basic, fundamental rights possessed by any citizen. While the protection of a citizen's natural rights was assured by the political power he had within his home state, these rights were not guaranteed in a state in which he was a non-resident. Id. The P&I Clause signified a promise to protect these basic rights shared by all citizens throughout the United States, thus fostering a sense that Americans constituted one people. See Howell, The Principles and Immunities of State Citizenship 13 (1918); see also, Tribe, supra, at 412.

that the federal courts should have jurisdiction in cases concerning the violation of the P&I Clause, specifically because the rights to be protected would be the fundamental rights possessed by all United States citizens:" It may be the esteemed basis of the Union, that 'the citizens of each State shall be entitled to all...privileges and immunities of citizens of the several States.'" Id. at 114.

Hamilton's views were seemingly shared by the other delegates to the Constitutional Convention as evidenced by the minimal debate concerning the Clause's adoption.[18] In addition, early state judicial decisions construing the Clause support his interpretation. For example, in Campbell v. Morris, 3 Harrison & McHen, 535

---

[18] The only reported debate on the clause was on August 28, 1787. On that date it is noted: "General Pinckney was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves." 5 Elliott's Debates 487 (2d ed. 1836), cited in Antieau, supra, at 6.

(Md. Gen'l. Ct. 1797), the court held that the rights protected by the Clause are basic, fundamental rights, such as the right to property; the phrase, "in the several states" designated the kind of right to be protected, not where the rights are guaranteed.[19] Likewise, Justice Bushrod Washington, the first federal judge to interpret the P&I Clause, found that it encompassed those privileges "which are, in their very nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and soverign." Corfield, 6 Fed. Cas., supra, at 551-552. The constitutional

---

19 Other early cases are in accord. See, e.g., Murray v. McCarty, 2 Munf. 373 (Va. Sup. Ct. App. 1811); Livingston v. Van Ingen, 9 Johns Cas. 507, 561 (N.Y. Ct. Err. 1812); Douglas v. Stephens, 1 Del. Ch. 465, 477 (Del. Ct. E.&A. 182).

orthodoxy of Corfield was accepted both by this Court and state tribunals prior to Paul. See Antieau, supra, at 10-15.

Further evidence that the fundamental rights interpretation was prevalent prior to Paul is found in the revealing legislative history of the Civil Rights Act and the Thirteenth and Fourteenth Amendments. The drafters of the Amendments and the Act all characterized the Clause as conferring such rights "common to men . . . which no man or state may rightfully take away."[20] These views of the leaders of Congress lead unerringly to the conclusion that the Framers intended the privileges and

---

20 Cong. Globe, 35th Cong., 2d Sess., 984 (1862), cited in Antieau, supra, at 15 (statement of Rep. John A. Bingham of Ohio). See also, e.g., Cong. Globe, 39th Cong., 2d Sess. 474-475 (1866) (statement of Sen. Lyman Trumbull [P&I confers "[s]uch fundamental rights as belong to every free person"]; id. at 1757, cited in Antieau, supra, at 15-16 (Sen. Trumbull's statement seeking a congressional override of Pres. Johnson's veto of the Civil Rights bill); id.,

(Footnote continued on next page)

immunities of Articles IV to protect fundamental rights that were integral to the formation of a national union.[21]

C. Contemporaneous Reasons For Inclusion of Clause

However, in order to understand fully all of the concerns that motivated the Framers of the Clause, it is necessary to review the complete historical background of its enactment. A survey of other relevant historical sources reveals that the balance struck in the P&I Clause was far more delicate than suggested by the sources relied on by Appellant. See Brief at 18, n.

(Footnote 20 continued)
at 1115-1119, cited in Antieau, supra, at 16 (statement of Rep. James Wilson ["Before our Constitution was formed, the great fundamental rights...belonged to every person who becomes a member of our great national family. No one surrendered a jot or a tittle of these rights by consenting to the formation of the government"].

[21] According to Rep. Wilson, there would have been no need for the proposed Civil Rights Bill if the states all had been willing to honor the P&I clause. Antieau, supra, at 16.

32.[22] When read together, these sources reveal the contributions of the Anti-federalists to the entire framing process, helping to

---

22 Thus, an examination will help provide the "peculiar wisdom...needed to expound the Constitution," 6 Fairman, Reconstruction and Reunion 1864-88, Part One, 1301 (1971) (emphasis omitted), so as "not merely to hold to [the] words [of the laws], but to comprehend as well their force and power," id.

The relevant literature considers the role of the Antifederalists in the drafting of both the Articles and the Constitution, see, e.g., Main, The Antifederalists: Critics of the Constitution, 1781-1788 (1961); Kenyon, ed., The Antifederalists (1966); Wood, ed., The Confederation and the Constitution: The Critical Issues (1973), and gives a sense of the many differing and overlapping ways the political forces of the time can be characterized, see, e.g., Main, supra, at 280; Wood, "The Worthy Against the Licentious," in Wood, supra, at 86, 94; Wolfe, "On Understanding the Constitutional Convention of 1787," 39 J. Politics 97, 112 (1977); Hutson, 8 Wm. & Mary Q., supra, at 356 (relying on terminology developed in Zagorin, The Court and the Country: The Beginning of the English Revolution 33-38 (1969)); see also, Kenyon, supra, at xcvii; Thomas, "The Virginia Convention of 1788: A Criticism of Beard's An Economic Interpretation of the Constitution;" 19 J. Southern Hist. 63 (1953). It also paints a more complete picture of socioeconomic conditions affecting the key question of interstate relationships prior to the

(Footnote continued on next page)

clarify the "concerns giving rise" to the inclusion of the P&I Clause.[23]

There can be little question that the P&I Clause was adopted "primarily as an instrument of national unification." Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487, 517 (1981) (hereinafter Varat). The intensity of the divisiveness which plagued the colonies prior to union was so extensive that John Adams could refer to Massachusetts as "our country" and to its delegation in the Continental Congress as "our embassy." Jensen I, supra, at 163-164, citing 1 Burnett, ed., Letters of

---

(Footnote 22 continued)
drafting of the Articles. See, e.g., Rogers, "Municipal Corporations," in Yale Law School Faculty, eds., Two Centuries Growth of American Law, 1701-1901 203 (1902); Schlesinger, The Colonial Merchants and the American Revolution, 1763-1776 (1918); see also sources cited in Jensen I, supra, at 7-8, n. 13.

[23] As indicated above, this Court has again recently endorsed the practice of integrating pre-constitutional sources into its opinions. See Solem, 51 U.S.L.W., supra, at 5021-5022.

Members of the Continental Congress 35, n. 4 (1921).

What must be explored, however, is the nature of the divisiveness, for this explains what national unity concerns were behind the Clause's enactment. The Framers -- both Federalists and Antifederalists alike -- understood European political history, and were familiar with problems faced by confederacies as ancient as Macedonia.[24] See, e.g., Federalist No. 80, ("[h]istory['s]...horrid picture of the dissensions and private wars which distracted and desolated Germany...towards the close of the

---

24 See, e.g., Riley, "Martin Diamond's View of The Federalist," Publius: J. Federalism, Vol. 8, No. 2 (Summer 1978), at 71, 81; see also, Jensen I, supra, at 142 (blaming failure of the Dutch Republic on policy of one-state one-vote); Winthrop, "The Letters of 'Agrippa,'" in Kenyon, supra, at 131, 142 (hereinafter "Winthrop") (state surrender of "unlimited right to regulate trade would drain ...[the extremes of the empire..., like Ireland and Scotland]").

15th century, supra, at 113).[25] See Rawles, A View of the Constitution of the United States of America 83-85 (1825); 2 Kent, Commentaries 84-85, n.b (12th ed. 1973); Miller, 8 U. Dayton L. Rev., supra, at 696.

This awareness naturally led to a concern that the colonies (subsequently, the states) could not afford to become "warring duchys," dissipating time, energy, resources and lives on internal trade and military wars. For these fears did, indeed, appear to be warranted; the states needed to "be restrained from making angry, oppressive, and destructive laws, from declaring ruinous wars with their neighbors, from fomenting quarrels and controversies." Webster, "The Weakness of Brutus Exposed," in Ford, supra, at 117, 128.

There was the fear of actual military warfare, that the militia of one state might attack

---

[25] For a sense of Hamilton's full historical scope in this regard, see 3 Farrand, supra, at 307-308.

another "with hostile fury," Smith, "An Address to the People of the State of New York," in Ford, supra, at 96. A "general government" was seen as necessary "to protect each State against domestic as well as external violence," Randolph, "Letter on the Federal Constitution," in Ford, supra, at 259, 267.[26]

As the colonies developed different, contradictory, foreign trade policies, see, Davis, supra, at 98-101; Jensen II, supra, at 297-301; Schlesinger, supra, at 529-535, the question of whether Congress or the states should have the power to regulate trade and levy tariffs emerged, Jensen II, supra, at

---

[26] This fear was not apocrophal. Settlers in Pennsylvania and Connecticut fought "violently" over the Wyoming Valley [in Northeastern Pennsylvania] area, while there was "open conflict" between Virginians and Pennsylvanians over the latter state's western boundaries. See Jensen II, supra, at 330; see also, Davis, Sectionalism in American Politics, 1774-1787 11 (1977).

287.[27]

But finally, the question of enactment of interstate trade barriers raised the most pressing and persistent concerns as to the future of the union.[28] Thus, even before the Revolution, New Jersey and Connecticut "levied higher duties on goods brought in from neighboring colonies in an [unsuccessful] effort to build up local commerce," Jensen II, supra, at 338; see also, Schlesinger, supra, at 152.[29] New Jersey citizens,

---

[27] See, e.g., Davis, supra, at 100; Jensen II, supra, at 292-293; see generally, McCormick, Experiment in Independence: New Jersey in the Critical Period, 1781-1780 (1950).

[28] The standard account of the period for instance, refers to Madison's efforts to restrict Virginia commerce to certain ports so merchants could get their goods to market "without interference from the Baltimore merchants," Davis, supra, at 112, and the attempts by other Virginians to have Annapolis, Maryland, rejected as a capital site for fear that that "would increase Baltimore's commercial influence," id. See also, id. at 65-69.

[29] For other similar actions by other colonies, see, e.g., id., at 195, 530-533.

Professor McCormick explains, "were naturally resentful about contributing to the support of the neighboring governments," supra, at 108;[30] soon after New Jersey's legislature declared all state ports "open" in 1783, merchants complained bitterly "about the drain of currency to New York and Philadelphia," id. at 112.[31]

---

30 New Jersey -- interestingly and ironically -- probably bore the brunt of the worst of the "mass of state legislation which hampered and restricted the free flow of commerce throughout the country." Murphy, The Triumph of Nationalism: State Sovereignity, the Founding Fathers, and the Making of the Constitution, 39 (1967). Murphy quotes James Madison: "New Jersey placed between Philadelphia and New York, was likened to a cask tapped at both ends." Id.

31 When the New Jersey legislature held a special session in 1784 -- to meet with representative town merchants -- it received a petition endowed with "the most ample immunities and privileges that may be useful for their own internal order and regulation." Id. at 117, quoting the petition of deputies as reported in the New Jersey Gazette, November 22, 1784 (emphasis added). This policy, McCormick reports, particularly "irritated" New York, id. at 120, which responded by exacting discriminatory clearance fees from boats traveling to and from New Jersey, id. at 120-121; New Jersey's response was to im-

It has thus been suggested that, by 1786, the nation was "sectionally rent," Davis, supra, at 108, over the states' inability to harmoniously solve commercial disputes which "raised questions about the very foundation of the Union," id. at 105. Although the fears of some "that large states would swallow up their neighbors," Jensen II, supra, at 337, proved unfounded, sectional divisiveness "remained troublesome throughout the revolutionary era, slowing the progress of the Articles of Confederation in Congress, stalling their ratification... causing major clashes in

---

(footnote 31 continued)

pose a tax on the lighthouse New York erected on Sandy Hook, id. at 121, citing Session Laws 112 (June 7, 1787). Notes McCormick:

> It is surprising that the diverse policies pursued by New York and New Jersey did not result in a more serious clash than that represented by the petty lighthouse tax. Id.

Congress...and in the Philadelphia Convention," Davis, supra, at 13.

The records indicates, then, that these were the true contemporary concerns of the Framers in their search for a "norm of comity," Austin, 420 U.S., supra, at 660: the avoidance of civil trade wars[32] and civil military wars among a group of fiercely independent colonies, divided deeply by sectional self-interest and bias, a separatism "not only legal but,...more important, psychological as well." Jensen I, supra, at 117. The Clause was designed to serve as the "instrument of national unification," Varat, supra, at 517, by breaking down boundaries of legal and psychological separatism which had plagued a nation seen as "a union without bounds of union, like a cask without hoops," Davis, supra, at 148, quoting

---

32 See Varat, 48 U. Chi. L. Rev., supra, at 488, n. 4.

Webster, A Dissertation on the Political Union and Constitution of the Thirteen United States 3 (1983).

D. The Complete Historical Record Reveals That The Clause Was The Product of A Delicate Accommodation Between The Proponents of State Sovereignty and National Unity

This backdrop helps put the critical question in a clearer perspective: how could the Articles -- and, eventually, the Constitution -- avoid the perpetuation of such strife, in light of the remarkable cultural diversity of the colonies, and the concomitant fear on the part of many of a consolidated government?

For there can be little question that the colonists treasured their diversity. As the "Agrippa" letters noted pithily, "It is impossible for one code of laws to suit Georgia and Massachusetts," Winthrop, supra, at 133, and, as Adams pointed out, "Philadelphia, with all of its and wealth and regularity, is not Boston."

Jensen I, supra, at 118, quoting 2 Adams, ed., The Works of John Adams, 393 (1850).[33]

This diversity led ineluctably to apprehensiveness as to consolidation. Although the 1787 view of Thomas Wait--"The vast Continent of America cannot be long subjected to a Democracy into one Government; you might as well attempt to rule Hell by Prayer," Main, supra, at 129, citing "Letter to George Thatcher," 16 Hist. Mag. 258 (1869)--might be seen as extreme, the fear of the "Aristocratical Saddle," Main, supra, at 132, with "boundless" authority, Kenyon, supra, at xliv, was real.[34]

---

[33] "The Antifederalists were saying, whether they realized it or not, that the people of America even in their several states were not homogeneous entities each with a basis similarity of interest for which an empathic elite could speak," Wood, supra, in Wood, supra, at 97. Jensen has characterized "the states' independence of one another" as "the greatest obstacle to a union of almost any kind," Jensen 1, supra, at 116.

[34] Kenyon is clear on this point:
[Footnote continued on next page]

However, since almost from ratification "the Confederation was being battered by the almost uncontrollable forces of interstate and especially intersectional conflict," Davis, supra,

---

(Footnote 34 continued)

> [The] fundamental principle [of the Antifederalists] was the belief that republican government could not be extended over a large geographical area with a numerous and heterogeneous population...The American people were too diverse in these respects to operate and be subject to a single, national, and to use their favorite term, consolidated government.

Supra, at cvi-cvii (emphasis in original).

It is thus not surprising that Richard Henry Lee, on behalf of the Continental Congress, circulated a letter to the states along with the Articles of Confederation, seeking dispassionate review of the Articles "under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities... differing in habits, produce, commerce and internal policy... under a conviction of the absolute necessity of uniting all our councils and all our strength, to maintain and defend our common liberties." Burnett, The Continental Congress 255-256 (1941).

at 58; see e.g., Ferguson, "The Nationalists of 1781-1783 and the Economic Interpretation of the Constitution," in Wood, ed., supra, at 1, 5-6, it became even more essential that a Constitution suitable for governing a "disharmonious society" be crafted, Smith I, supra, at 26.[35] Such a Constitution was drafted, "embod[ying] at least a general consensus of seminal political values and attract[ing] widespread endorsement and consent." Saphire, 8 U. Dayton

---

35 It has thus been suggested that a major key to the Constitution's longterm success was its "initial acceptance by both Federalists and Anti-federalists." Boyd, The Politics of Opposition: Antifederalists and the Acceptance of the Constitution, xi (1979). This acquiescence by the Antifederalists was crucial; "it implied that men like Richard Henry Lee...., although opposed to the Constitution, were willing to operate within the framework of the Constitution," id. at 19, thus paving the way towards a meaningful political consensus.

L. Rev., supra, at 790.[36]

The unique role of the P&I clause as the promoter of national unity can then be seen through this historical filter: in attempting to draft a document which would appeal to (or at least be accepted by) Federalists and Antifederalists alike, the Framers had to "walk a tightrope" between the needs of a strong union and the fears that consolidation would be the first step towards destruction of the nation's cultural diversity. The problems which bedeviled the Confederation -- civil strife, trade wars, inconsistent dealings with foreign powers -- needed to be dealt with in a way which would thus promote unity without impairing the vitality of the "continuation

---

[36] See also, Brest, 60 B.U.L. Rev., supra, at 234; Roche, "What Was the Relation of the Constitution to Democracy? The Founding Fathers: A Reform Caucus in Action," in Wood, supra, at 113, 136.

of state government." Varat, supra, at 517.[37]

---

37 "Fulfillment of the fundamental obligation of state government -- to care for the state's own residents -- depends, to some ill-defined degree, on the ability to withhold from others what a state chooses to provide its own." Id. at 490. Cf. Reeves, Inc. v. Stake, 447 U.S. 429, 442 (1980) (restrictions on the enjoyment of numerous state services to state residents is consistent with an "essential and patently unobjectionable purpose of state government"). The fact that the Framers retained the concept of state government -- making "some basic assumptions about the nature of state communities and the scope of state powers and functions ... compel[s] recognition of some state power to deviate from the apparently flat prohibition against state discrimination on the basis of residence." Varat, supra, at 520. See also, Currie, supra, at 446 (differential treatment essential "if laws are to be rationally administered").

II. THE PRIVILEGES AND IMMUNITIES CLAUSE IS NOT A BAR TO A CITY ORDINANCE THAT ACCORDS A LIMITED PREFERENCE TO ITS OWN RESIDENTS IN PUBLICLY FUNDED, PUBLIC WORKS PROJECTS FOR OR ON BEHALF OF THE CITY

The historical background of the P&I Clause documented in Point I[38] informs an analysis of the constitutional validity of the Camden ordinance in the present case. When viewed against this historical backdrop, it is evident that the concerns underlying the Framers' inclusion of the Clause in the Constitution are simply not implicated by a narrowly

---

[38] As in Marsh v. Chambers, supra, the historical evidence is extremely illuminating in assessing a matter of contemporary concern:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment clause to mean, but also on how they thought that Clause applied to the practice authorized by by the First Congress -- their actions reveal their intent. Id., 51 U.S.L.W. at 5164.

drawn municipal ordinance which (1) sets aside 40% of public works jobs for residents of Camden, an economically depressed city; and (2) reserves 60% of all such jobs for nonCamden residents, both within and outside of the State of New Jersey, to be filled in a wholly nondiscriminatory fashion.

A. The Privileges and Immunities Clause Does Not Apply To A Local Ordinance That Favors City Residents OverIn State and OutOfState NonResidents

As Point I establishes, the Clause was drafted "to help fuse into one Nation a collection of independent sovereign States," Toomer v. Witsell, 385, 395, 334 U.S. (1948). To achieve this goal the Framers placed nonresidents "upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned ...[and]... relieve[d] [nonresidents] from the disabilities of alienage in other States." Paul, 75 U.S., supra, at 360; see

Blake v. McClung, 172 U.S. 239, 256 (1898).[39]

Viewed in light of these purposes, it is clear that the Clause is not applicable to a city's ordinance that favors its own residents over non-residents in the rest of the country, both in-state and out-of-state. First, the ordinance does not discriminate against out-of-state residents. With respect to the availability

---

[39] Paul was explicit in stating that "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens." Paul, 75 U.S., supra, at 360 (emphasis added). More recently, the Court has explained that the Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer, 334 U.S., supra, at 395.

See also Ely, Democracy and Distrust: A Theory of Judicial Review 23 (1980)(Article IV, Section 2 "was an equality provision intended to keep states from treating outsiders worse than their own citizens"), and id. at 83 (clause "was intended and has been interpreted to mean that state legislatures cannot by their various regulations treat out-of-staters less favorably than they treat locals").

of those public works jobs in Camden covered by the ordinance, non-New Jersey residents are upon precisely "the same footing" as non-Camden, New Jersey residents. New Jersey has certainly not granted any advantages in its Constitution or laws to its state residents in securing public works jobs in Camden. To the contrary, New Jersey residents who do not reside in Camden suffer from the same disadvantages as construction workers from any other state. Therefore, any "disabilities of alienage" are shared by all non-Camden residents[40]. Consequently, this is not a

---

40 The Supreme Court of New Jersey conjectured that the Camden ordinance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents." United Bldg. and Constr. Trade Council v. Camden, 88 N.J., supra, at 341, 443 A.2d at 160. Although the record is silent on this assertion, this is beside the point; in the absence of any record on impact, see infra at pp 50-52, the only pertinent inquiry in assessing the facial validity of the ordinance is whether it affects both New Jersey residents not living in Camden and out-of-state residents.

situation within the scope of the P&I Clause, for the Camden ordinance does not affect "the States...treatment of each other's residents." Hicklin, 437 U.S., supra, at 523.[41]

Not only history and precedent, but the wisdom of the Framers, supports this interpretation. The drafters recognized "non-residents are a paradigmatically powerless class politically." Ely, Democracy and Distrust, supra, at 83. Cf. Austin, 420 U.S., supra, at 662-63. By focusing on discrimination against non-residents and ensuring that their interests are linked to those

---

41 There may be situations, of course, where a city's action favoring local residents may have the effect of, or even be a subterfuge for, furthering a statewide policy of discrimination against out-of-state residents. Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951). There is no suggestion in the present record that the City of Camden, or the State of New Jersey, is seeking to implement such a policy; without a fully-developed record, such a hypothetical possibility, see Brief of Appellant at 29-30, does not warrant application of the P&I Clause.

of residents possessing political power, there was a self-perpetuating Constitutional guarantee adequately protecting non-residents' interests. Id.

But this purpose is no longer appropriate if the effect of Camden's ordinance favoring its residents is to treat non-Camden, New Jersey residents in the same manner as non-New Jersey residents. In this situation, the interests of out-of-state residents can be fully vindicated without resort to the Clause, since, presumably, the affected non-Camden state residents could take appropriate political action to repeal or limit the ordinance.

If anything, tearing the Clause from its historic roots, and employing it as a bar to innovative local efforts, could lead to results fundamentally at odds with the Framers' efforts to preserve a dynamic federal scheme of government. Cf. New State Ice Co. v. Liebmann, 285 U.S., 262, 311 (1932) (Brandeis, J., dissenting).

See also, Chandler v. Florida, 449 U.S. 560, 579-80 (1981). Municipalities would be unable to experiment with creative programs favoring residents so as to combat unemployment or foster economic revitilization. Surely, the Framers did not intend to create a rigid constitutional straightjacket that would "threaten the future fashioning of effective and creative problems for solving local problems and distributing government largesse." Reeves, Inc., 447 U.S., supra, at 429. As the New Jersey Supreme Court aptly observed: "It is not the purpose of the United States Constitution to stifle the legitimate attempts of state and local governments to deal effectively with their social ills." United Bldg. and Constr. Trades Council, 88 N.J., supra, at 340, 443 A.2d at 159.

B. The Reduced Opportunity To Work On A Publicly Funded, Public Works Crew Is Not A Privilege Or Immunity Protected By Article IV, Sec. 2

There is no intimation in the history or application of the Clause that all distinctions between residents and non-residents are invalid. Baldwin, 436 U.S., supra, at 383. The Clause was designed to remove from non-residents "the disabilities of alienage," Paul, 75 U.S., supra, at 360, not to deprive a state resident of any benefits that may accrue from residency in the particular state. "Some distinctions... merely reflect the fact that this is a Nation composed of individual States, and are permitted; other[s]...are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." Baldwin, 436 U.S., supra, at 383.

Appellant suggests that nonresidents of New Jersey are deprived of a fundamental privilege or immunity protected by the Clause because Camden's ordinance excludes them from seeking access to private employment opportunities in Camden. Brief of Appellant at 20-25; the record does not

support this reading. First, the unions constituting the United Building and Construction Trades Council of Camden County and Vicinity (Council) include an undefined number or percentage of "persons who reside in the City of Camden, persons who reside in New Jersey but outside the City of Camden and persons who reside outside the State of New Jersey." Id. at 45. However, there is no indication in the record that the 60% set-aside for nonresidents of Camden is insufficient to accommodate the employment needs of any non-New Jersey residents in Camden public works construction crews. Nor is there any indication of the extent to which the Council's employees in the building and construction trades, many of whom "perform extremely specialized tasks," id. at 5, will be, or have been, adversely affected by the provisions of the ordinance, which only require that 40% of "the entire labor force" be residents of the City of Camden, id. at 2

(emphasis added). Indeed, the impact of the Camden ordinance upon nonresidents is even more speculative than in White, 103 S.Ct., supra, at 1045, n. 6, where at least the parties had "stipulated that some out-of-state workers who would otherwise have been employed on the projects would be unemployed."

Second, the record "does not show that the increased employment of city residents in publicly funded construction projects has been accompanied by a decline in the percentage of out-of-state residents." Id. Therefore, appellant has not demonstrated in the present record that out-of-state residents would necessarily, or even likely, be deprived of the opportunity to participate in the 60% component of the public works construction crews that contains non-residents of Camden.

When stripped of its rhetorical gloss, appellant's attack is solely on the facial validity of a city ordinance that sets aside 40% of local,

publicly funded, public works consturction jobs for city residents. In effect, appellant seeks a determination that, even though out-of-state residents can qualify for, or fill, 60% of jobs on any project covered by the ordinance, their undefined, and perhaps nonexistent, reduced opportunity to work on these crews denies a fundamental "privilege" or "immunity" protected by Article IV, Sec. 2. This expansive construction of the Clause is neither supported by its history nor by this Court's prior decisions.

First, non-residents of New Jersey are not being saddled with a discriminatory restriction favoring New Jersey residents. Instead, non-Camden New Jersey residents also have a reduced opportunity to work on Camden work crews. There is thus no basis for assuming that the opportunity afforded Camden residents by its municipal ordinance is a fundamental "privilege" or "immunity" of New Jersey state citizenship.

Second, while this Court has repeatedly recognized that the Clause protects the State's regulation of the private marketplace, Hicklin, supra; Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer, supra, these decisions do not support the conclusion that employment in public works construction projects funded by public funds is equally fundamental. Indeed, the special nature of the state's public role in these circumstances militates against treating this as another species of regulation over private employment. Here, the city is allowing limited preferential treatment for its residents as an incident to the exercise of a proprietary interest in construction projects to be performed for or on behalf of the City. Cf. Hicklin, 437 U.S., supra, at 529. In this role, Camden, like private individuals and businesses, retains flexible authority "to produce its own supplies, to determine those which whom it will deal, and to fix the terms and conditions upon

which it will make needed purchases." Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). Cf. Doe v. Bolton, 410 U.S. 179, 200 (1973) (dictum) (abortion residency requirement "not based on any policy of preserving state-supported facilities for [state] residents").

The Clause was designed to prevent discriminatory treatment towards non-residents in the regulation of private employment; however, it was never intended, and is ill-suited, to serve as a rigorous limitation on any distinctions between non-residents and residents when a state or municipality is functioning in a proprietary role. In the same manner that the State or city may give residents preferred access to its publicly owned natural resources without offending the P&I Clause, Baldwin, 436 U.S., supra, at 385-86, it may provide a preferential bias for its residents in actions undertaken with public

funds for or on behalf of the state or city.[42]

Finally, the ordinance's imprecise effect on a non-resident's opportunity for employment is very different from the broad restrictions and disparate treatment previously condemned by this Court. See e.g., Hicklin, Toomer. In Hicklin, for example, Alaska law had established a preference for state residents in every area of private employment linked, however remotely, to the development of the State's oil and gas reserves. 437 U.S. at 530-533. This absolute, virtually limitless, preference for the residents of Alaska patently disfavored any non-resident who entered the State to work, automatically relegating the

---

42 Cf. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (New York statute limiting employment "in the construction of public works" to United States citizens upheld against broad constitutional challenges, including attack under Art. IV, Sec. 2, because State was acting in proprietary capacity). But see, Hicklin, 437 U.S., supra, at 531, n. 15.

latter to a secondary position as job-seeker merely by virtue of his or her non-resident status. The disadvantages to the non-resident were obvious, immediate and considerable.

In contrast, where public funds are expended in construction projects for or on behalf of the city, Camden's ordinance limits less than half of the jobs on a limited number of work crews to its residents as a means of reducing unemployment and stimulating local economic revitilization. Clearly, the carefully circumscribed ordinance "does not represent the sort of 'attempt to force virtually all businesses that benefit in some way from the economic ripple effect' of the city's decision to enter into contracts for construction projects 'to bias their employment practices in favor of the [city's] residents'" White, 103 S.Ct., supra, at 1046 (quoting Hicklin, supra).

Finally, Camden is still allowing non-residents access to 60% of the employment on these work

crews. The vague and limited impact upon non-residents from the preference accorded residents in Camden in 40% of the jobs is different in both quantity and quality from the breadth of the discrimination towards, and total exclusion of, nonresidents invalidated in prior cases. Hicklin; Toomer, supra. In sum, appellant's interest in an increased opportunity for employment on public work crews, at the expense of Camden's efforts to combat unemployment and stimulate the city's economy, "simply does not fall within the purview of the... Clause." Baldwin, 436 U.S., supra, at 388.

C. This Court's Interpretation of The Commerce Clause Provides Persuasive Support For Upholding The Validity of The Camden Ordinance

There is a close relationship between the purpose of the P&I and the Commerce Clauses, "stem[ming] from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." Hicklin,

437 U.S., supra, at 531-32. In light of their identical roots and historical design, it is no accident that the development of the interstate privileges and immunities provision has followed a "course closely parallel to that of the Commerce Clause." Tribe, supra, at §632. As a result of the "mutually reenforcing relationship" between the two Clauses, Hicklin, 437 U.S., supra, at 531, this Court has frequently sought guidance for the interpretation of the former constitutional provision in decisions interpreting the latter, and vice versa. See, e.g., Baldwin, 436 U.S., supra, at 38586 (P&I Clause); White, 103 S.Ct., supra, at 1046 (Commerce Clause).

Under the Commerce Clause cases, a state is immune from its constraints when it acts as a market participant, rather than as a market regulator. Reeves Inc., 447 U.S., supra, at 436. See also, Hughes, 426 U.S., supra, at 809-810; White, 103 S.Ct., supra, at 1044. This

immunity is predicated on several factors. First, the historical origins of the Commerce Clause provide "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Reeves, Inc., 447 U.S., supra, at 437. Second, the immunity is supported by the "vision of federalism," Hicklin, 437 U.S., supra, at 532, and "considerations of state sovereignty," Reeves, Inc., 447 U.S., supra, 438, that underlie the Commerce Clause. Third, "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." Reeves, Inc., 447 U.S., supra, at 439. These reasons readily explain why the Court has upheld a city's ability under the Commerce Clause to favor residents when the city is expending public funds "in entering into construction contracts for public projects." White, 103 S.Ct., supra, at 1048.

These reasons provide an equally compelling basis for upholding the preferential treatment accorded Camden residents under the P&I Clause. Both the historical record and fundamental notions of federalism support the ability of a city under this Clause to exercise a limited bias in favor of its own residents when entering into contracts for publicly-funded construction projects for or on behalf of the city. Furthermore, the complex nature of urban renewal and economic revitilization require more than the appellant's simplistic use of the Clause as a bar to all resident preferences in hiring for public works construction projects. Appellant's interpretation would convert a constitutional shield for nonresidents into a bludgeon that stifles local initiatives in combatting contemporary urban problems. Even more seriously, it would ignore this Court's mandate that the Clause should always be construed with "due regard for the principle that the states should have

considerable leeway in analyzing local events and in prescribing appropriate cures." Toomer, 334 U.S. supra, at 396.

CONCLUSION

The drafters of the Privileges and Immunities Clause fully intended to mold the separate colonies into a national union; however, the historical record also reveals that they wished to preserve the vitality of the sovereign states in a federal system. Therefore, it defies reason and the historical design of the clause to assume, as appellant does, that the Framers in one brief sentence sought to divest the states of one of their unique attributes in a federal system -- the ability to favor residents in the formulation of innovative solutions to social and economic ills. Nothing in the Clause precludes a city, in its efforts to combat urban decay, from according limited preferential treatment to its own residents

in publicly-financed, public construction contracts performed for or on behalf of the city. To suggest that the ordinance is barred by the P&I Clause attributes a narrowness of vision to the Framers belied by history and this Court's precedents. The judgment of the Supreme Court of New Jersey fully accords with the intent of the Framers and prior decisions of this Court; it should therefore be affirmed.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
Public Advocate

R. WILLIAM POTTER
Assistant Public Advocate

By: _____

MICHAEL L. PERLIN*
Special Counsel to the
Public Advocate

RICHARD E. SHAPIRO
Director, Division of Publi
Interest Advocacy

SUZAN R. SHAPIRO
ANN C. SWEENEY
Legal Interns

*Counsel of Record